

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TODD JAMES BROXMEYER,

Petitioner,

v.

CIVIL ACTION No. 2:18cv240

L. RAY ORMOND, Warden,
FCI Petersburg-Low,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2241 submitted by pro se Petitioner Todd James Broxmeyer ("Broxmeyer" or "Petitioner"). (ECF No. 1). Broxmeyer argues that the trial court's use of "uncharged, dismissed and acquitted conduct" in calculating his Sentencing Guidelines range is unconstitutional under the Supreme Court's decision in Nelson v. Colorado, 137 S. Ct. 1249 (2017). He seeks a new sentence that excludes consideration of such conduct.

The matter was referred to a United States Magistrate Judge for report and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. The Report and Recommendation filed April 22, 2019 recommends dismissal of the petition without prejudice. (ECF No. 16). Each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. After a

brief extension was granted (ECF No. 18), on May 24, 2019 the court received Petitioner's Objections to the Report and Recommendation. (ECF No. 19). The Respondent filed no response to the objections and the time for responding has now expired.

The court, having reviewed the record and examined the objections filed by Petitioner to the Report and Recommendation and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation filed April 22, 2019. It is, therefore, ORDERED that Respondent's Motion to Dismiss be GRANTED and the Petitioner's petition be DENIED and DISMISSED without prejudice.

Finding that the basis for dismissal of Petitioner's § 2241 petition is not debatable, and alternatively finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is DENIED. 28 U.S.C. § 2253(c); see Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a); Miller-El v. Cockrell, 537 U.S. 322, 335-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-85 (2000).

Petitioner is ADVISED that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. Rule App. Proc. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). If Petitioner intends to seek a certificate of appealability from the Fourth Circuit, he must do so within sixty

(60) days from the date of this Order. Petitioner may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk is directed to mail a copy of this Final Order to Petitioner and to provide an electronic copy of the Final Order to counsel of record for Respondent.

/s/ MJD
MARK S. DAVIS,
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

June 20, 2019